March 5 1872
Mr Cooper
Mr Solomon 25th on 1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~326~~ 127

BALIE PEYTON, APPELLANT,

vs.

G. HEINEKEN & G. W. PALMORE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

aff

FILED OCTOBER 5, 1870.

March 30 1872
Affirmed
Mr Justice Strong

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ticable, by car loads or otherwise, and that they should sell said flour exclusively, except such sales as might be made by said Peyton by retail at his said mill, and should account to said Peyton for the nett proceeds thereof; that your complainants G. Heineken & Pal-
4 more should receive interest on the money advanced by them, according to the laws of New York, in which State they then resided, and where they expected to advance the money, and also $2\frac{1}{2}$ % commissions on the sales of said flour, and that the money so arising from said sales, after deducting the interest and the costs, and charges of selling said flour should be applied to the credit of said Peyton on his account for the money so advanced to him from time to time by the said G. Heineken & Palmore. It was further agreed between the parties, and so expressed in the contract, that if the said Peyton should fail to pay to your complainants, G. Heineken & Palmore, the principal and interest advanced by them to him under said contract, when called on so to do, then on such default the trustee, your complainant W'm E. Milton, should advertise and sell the property mortgaged in said contract, for cash, upon giving twenty days' notice of the time and place of sale, at the court-house, in the town of Gallatin, and should pay the proceeds of sale, after first deducting the expenses of the trust to the said G. Heineken and Palmore, or should pay them so much as
5 would satisfy their debt. But without attempting further to give the substance of said contract, they herewith file the said contract itself, marked on the back Exhibit A to this bill, and pray that the same may be made and taken as a part of this bill as fully as if herein copied.

Your complainants now further state that, by virtue of said contract, and to comply with their promise and undertaking, they did, from time to time, advance money to the said Bailie Peyton, and which, (including the value of 500 seamless bags, sent to said Peyton, and a balance of interest $263 06,) amounted, in the aggregate, to the sum of eighteen thousand five hundred and thirty-three $\frac{14}{100}$ dollars, and which they are ready and able to prove, should the said Peyton deny the same.

They also state that said Bailie Peyton shipped to them flour, to be sold, and which they did sell, and put to his credit the net proceeds thereof, according to the said contract; that he so sent to your complainants, G. Heineken & Palmore, in September, 1868, four hundred and eighty-one barrels of flour; and in October of that year he sent
6 to said firm five hundred and fifty-one barrels of flour; and this was all the flour he ever sent to said firm; that this flour was sold, and the net proceeds carried to his credit, as before stated, leaving him in debt to the said firm of G. Heineken & Palmore over ten thousand dollars. The precise amount of indebtedness of the said Bailie Peyton to the said firm of G. Heineken & Palmore, is ten thousand and thirty-four $\frac{05}{100}$ dollars, with interest from 1st Dec., 1868, at 7 %, that being the legal interest of New York, which they now claim, and to enforce the payment of which they file this bill. They have repeatedly asked the said Peyton for said money, but he has declined and refused to pay the same, and alleged, as the principal ground of his refusal, that the said account was not exactly correct, inasmuch as it included some charges for which he did not think himself liable. Complainants think that it is correct, and that they will be able to establish its correctness to the satisfaction of the court; and inasmuch as the said account is not altogether satisfactory to the defendant, they have thought it to be
7 just to him and proper, to come into a court of equity, and ask that an account be taken, and that its exact amount be ascer-

tained previous to a sale of said property, instead of giving the twenty days' notice, and selling as authorized by the contract.

In consideration whereof, and *for* inasmuch as your complainants are remedyless at law, and can have adequate relief only in a court of equity, they pray that the said Bailie Peyton be made a party defendant to this bill; and to this end that subpœna to answer, and all suitable process issue from this court, and beserved upon him; that an account be ordered, and the precise amount due to your complainants, G. Heineken & Palmore, be ascertained.

And, the premises considered, may it please your honors to foreclose said mortgage; order and decree that the property embraced in said contract be sold, and sold free from the equity of redemption, and the proceeds applied to the payment and satisfaction of their said debt. And for such other and further and different relief to which they may be entitled.

BROWN & REID, *Solicitors.*

8 *Exhibit A to complainant's bill.*

For the consideration of five dollars, to me in hand paid, and the other considerations hereinafter mentioned, I have bargained and sold, and hereby transfer and convey to William E. Milton, as trustee, the following-described real estate, with all the houses, improvements, machinery, and fixtures on the same, consisting of a steam and water flouring mill, and houses for the miller, lying in Sumner County, Tennessee, on West Station, Camp Creek, on the Nashville & Gallatin turnpike, about 4½ miles west of the town of Gallatin, consisting of three and three-fourth acres of ground on which the mill-house stands; the boundaries of which are set forth in the deed from R. A. Chapman to me, and registered at Gallatin, August 15, 1861, and one acre on which the miller's house stands, conveyed to me by John F. Cage, and registered at Gallatin about the same time. The considerations and purposes of this conveyance are as follows: G. Heineken & Palmore, commission merchants, of the city and State of New York, from time to time, as required, agree to advance me in cash ten thousand dollars or more,
9 if mutually agreed upon, for the purpose of purchasing wheat to be ground at my said mill, and I am desirous of securing them, in the payment of said advances; the wheat so purchased to be ground, and the flour to be shipped to the said firm in New York, according to the directions of the said trustee, as fast as practicable, by the car load, or otherwise, and to account to me for the net proceeds thereof. It is further agreed, that the said firm of G. Heineken & Palmore shall have the exclusive sale of all the flour ground at my mill, the produce of wheat purchased with their advances, except such sales as I may make at retail at the mill. It is further agreed, that G. Heineken & Palmore are to receive the legal interest of the State of New York for advances, and 2½ per cent. commissions on sales. It is further agreed, that the money arising from the sales of the flour, less the interest and commissions, &c., is to be paid over and applied to my credit from time to time, as sales take place. If I shall comply with the terms and conditions above mentioned, and pay to the said G. Heineken & Pal-
10 more the principal and interest on the advances made by them as aforesaid, when called on so to do, then this obligation to be void; but on default thereof, W'm E. Milton, the trustee aforesaid, shall advertise & sell the property above mentioned for cash, upon giving twenty days' notice, at the court-house door, in the town of Gallatin, and

ticable, by car loads or otherwise, and that they should sell said flour exclusively, except such sales as might be made by said Peyton by retail at his said mill, and should account to said Peyton for the nett proceeds thereof; that your complainants G. Heineken & Palmore should receive interest on the money advanced by them, according to the laws of New York, in which State they then resided, and where they expected to advance the money, and also $2\frac{1}{2}$ % commissions on the sales of said flour, and that the money so arising from said sales, after deducting the interest and the costs, and charges of selling said flour should be applied to the credit of said Peyton on his account for the money so advanced to him from time to time by the said G. Heineken & Palmore. It was further agreed between the parties, and so expressed in the contract, that if the said Peyton should fail to pay to your complainants, G. Heineken & Palmore, the principal and interest advanced by them to him under said contract, when called on so to do, then on such default the trustee, your complainant W'm E. Milton, should advertise and sell the property mortgaged in said contract, for cash, upon giving twenty days' notice of the time and place of sale, at the court-house, in the town of Gallatin, and should pay the proceeds of sale, after first deducting the expenses of the trust to the said G. Heineken and Palmore, or should pay them so much as would satisfy their debt. But without attempting further to give the substance of said contract, they herewith file the said contract itself, marked on the back Exhibit A to this bill, and pray that the same may be made and taken as a part of this bill as fully as if herein copied.

Your complainants now further state that, by virtue of said contract, and to comply with their promise and undertaking, they did, from time to time, advance money to the said Bailie Peyton, and which, (including the value of 500 seamless bags, sent to said Peyton, and a balance of interest $263 06,) amounted, in the aggregate, to the sum of eighteen thousand five hundred and thirty-three $\frac{14}{100}$ dollars, and which they are ready and able to prove, should the said Peyton deny the same.

They also state that said Bailie Peyton shipped to them flour, to be sold, and which they did sell, and put to his credit the net proceeds thereof, according to the said contract; that he so sent to your complainants, G. Heineken & Palmore, in September, 1868, four hundred and eighty-one barrels of flour; and in October of that year he sent to said firm five hundred and fifty-one barrels of flour; and this was all the flour he ever sent to said firm; that this flour was sold, and the net proceeds carried to his credit, as before stated, leaving him in debt to the said firm of G. Heineken & Palmore over ten thousand dollars. The precise amount of indebtedness of the said Bailie Peyton to the said firm of G. Heineken & Palmore, is ten thousand and thirty-four $\frac{05}{100}$ dollars, with interest from 1st Dec., 1868, at 7 %, that being the legal interest of New York, which they now claim, and to enforce the payment of which they file this bill. They have repeatedly asked the said Peyton for said money, but he has declined and refused to pay the same, and alleged, as the principal ground of his refusal, that the said account was not exactly correct, inasmuch as it included some charges for which he did not think himself liable. Complainants think that it is correct, and that they will be able to establish its correctness to the satisfaction of the court; and inasmuch as the said account is not altogether satisfactory to the defendant, they have thought it to be just to him and proper, to come into a court of equity, and ask that an account be taken, and that its exact amount be ascer-

tained previous to a sale of said property, instead of giving the twenty days' notice, and selling as authorized by the contract.

In consideration whereof, and *for* inasmuch as your complainants are remedyless at law, and can have adequate relief only in a court of equity, they pray that the said Bailie Peyton be made a party defendant to this bill; and to this end that subpœna to answer, and all suitable process issue from this court, and beserved upon him; that an account be ordered, and the precise amount due to your complainants, G. Heineken & Palmore, be ascertained.

And, the premises considered, may it please your honors to foreclose said mortgage; order and decree that the property embraced in said contract be sold, and sold free from the equity of redemption, and the proceeds applied to the payment and satisfaction of their said debt. And for such other and further and different relief to which they may be entitled.

BROWN & REID, *Solicitors.*

8 *Exhibit A to complainant's bill.*

For the consideration of five dollars, to me in hand paid, and the other considerations hereinafter mentioned, I have bargained and sold, and hereby transfer and convey to William E. Milton, as trustee, the following-described real estate, with all the houses, improvements, machinery, and fixtures on the same, consisting of a steam and water flouring mill, and houses for the miller, lying in Sumner County, Tennessee, on West Station, Camp Creek, on the Nashville & Gallatin turnpike, about 4½ miles west of the town of Gallatin, consisting of three and three-fourth acres of ground on which the mill-house stands; the boundaries of which are set forth in the deed from R. A. Chapman to me, and registered at Gallatin, August 15, 1861, and one acre on which the miller's house stands, conveyed to me by John F. Cage, and registered at Gallatin about the same time. The considerations and purposes of this conveyance are as follows: G. Heineken & Palmore, commission merchants, of the city and State of New York, from time to time, as required, agree to advance me in cash ten thousand dollars or more,
9 if mutually agreed upon, for the purpose of purchasing wheat to be ground at my said mill, and I am desirous of securing them, in the payment of said advances; the wheat so purchased to be ground, and the flour to be shipped to the said firm in New York, according to the directions of the said trustee, as fast as practicable, by the car load, or otherwise, and to account to me for the net proceeds thereof. It is further agreed, that the said firm of G. Heineken & Palmore shall have the exclusive sale of all the flour ground at my mill, the produce of wheat purchased with their advances, except such sales as I may make at retail at the mill. It is further agreed, that G. Heineken & Palmore are to receive the legal interest of the State of New York for advances, and 2½ per cent. commissions on sales. It is further agreed, that the money arising from the sales of the flour, less the interest and commissions, &c., is to be paid over and applied to my credit from time to time, as sales take place. If I shall comply with the terms and conditions above mentioned, and pay to the said G. Heineken & Pal-
10 more the principal and interest on the advances made by them as aforesaid, when called on so to do, then this obligation to be void; but on default thereof, W'm E. Milton, the trustee aforesaid, shall advertise & sell the property above mentioned for cash, upon giving twenty days' notice, at the court-house door, in the town of Gallatin, and

after deducting the expenses of the trust, the balance is to be paid to the said G. Heineken & Palmore, or a sufficiency to discharge all my liability to them, the said trustee is empowered to make to the purchaser of said property a deed, with covenant of warranty, as full as I myself could do. Signed, sealed, and delivered at Gallatin, July 11, 1870.

BALIE PEYTON. [SEAL.]
G. HEINEKEN, & PALMORE. [SEAL.]
Per WM. E. MILTON, *Agent.*

[10-$ rev. stamp, cancelled.]

STATE OF TENNESSEE, *Sumner County:*

Personally appeared before me, Lee H. Alley, clerk of the county court of said county, Balie Peyton, G. Heineken & Palmore, by W'm E. Milton, agent, the bargainors, with whom I am personally acquainted, and acknowledged the execution of the within instrument for the purposes therein contained.

11 Witness my hand at office, this 11th July, 1868.

LEE H. ALLEY, *Clerk.*

Rec'd for registration, 11th July, 1868, at 3 o'clock, p. m., registered & examined the same day received.

RO. HALLUM,
Reg'r S. County.

STATE OF TENNESSEE, *Sumner County:*

I, Ro. Hallum, register of said county, do hereby certify that the above instrument and certificate is duly registered in my office, in bill book M, page 582.

RO. HALLUM,
Reg'r S. County.

On the 10 day of March, 1869, a subpœna to answer was issued, which is as follows:

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon Balie Peyton, a citizen of the State of Tennessee, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the middle district of Tennessee, at the Federal court-room, at Nashville, in said State, on the third Monday in April next, then

12 and there to answer a bill filed on the equity side of said court by G. Heineken and Geo. W. Palmore, partners trading as G. Heineken & Palmore, citizens of the State of New York, and W'm E. Milton, a citizen of the State of Kentucky. Herein fail not, and have then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of Supreme Court of the United States, this the third Monday in October, in the year of our Lord 1868, and of the independence of the United States the 93rd.

[SEAL OF THE COURT.] E. R. CAMPBELL, *Clerk.*
By J. W. CAMPBELL, *D. C.*

Executed by leaving with Balie Peyton a copy of this subpœna to answer, and a copy of the bill, March 19, 1869.

E. R. GLASCOCK, *Marshal.*
By H. C. McQUIDDY, *D. M.*

On the 30 day of April, 1869, the defendant filed his answer, which is as follows:

The answer of Balie Peyton to the bill of complaint of G. Heineken & Palmore, filed in the circuit court of the United States for the middle district of Tennessee.

13 Respondent admits the citizenship of complainant and himself, as stated in the bill, and that they are partners. Respondent admits the contract as shown in the exhibit to complainant's bill, but denies the inferences and conclusions drawn therefrom, and to all that part of complainant's bill replies, the contract and its true and legal construction. Respondent alleges that under said contract he received of complainant monies as follows, to wit:

July	9,	1868,	of	W. E. Milton, ag't	of complainants..	$2,500 00
"	21,	"	"	do.	" "	2,500 00
Aug.	12,	"	"	do.	" "	4,000 00
"	24,	"	"	do.	" "	4,000 00
Sept.	8,	"	"	do.	" "	1,000 00
"	11,	"	"	do.	" "	640 00
"	23,	"	"	do.	" "	1,120 00
Oct.	2,	"	"	do.	" "	1,120 00
"	7,	"	"	do.	" "	1,100 00
						$17,960

Of the above amount that item of date Aug't 24, 1868, for $4,000 was a draft drawn by complainant's agent in Tennessee on themselves, in New York, and which was discounted at a loss of $40, so that the amount actually realized from the sum in Tennessee was $3,960 00, and this latter is the amount to be charged to defendant, thus making the sum total to be charged by complainants to
14 respondent the sum of $17,920 instead of the sum stated in complainant's bill.

Respondent further answering would state that, without following the details of complainant's bill, in regard to the amount of flour shipped to complainants, or their order, as follows, and of the following dates and brands, and with which they are to be charged:

Aug.	17,	1868,	by railroad,	" Peytona"	brand,	barrels	.....	92
Sept.	2,	"	" " "	"	"	"		39
"	11,	"	" " "	"	"	"		6
"	18,	"	via Savannah,	"	"	"		62
"	29,	"	" Louisville,	"	"	"		65
Oct.	7,	"	" "	"	"	"		80
			Total of Peytona brand				.....	344

STATION CAMP BRAND.

Aug.	17,	1868,	shipped via Louisville,	Station Camp	brand	.....		69
"	21,	"	"	"	"	"		42
"	28,	"		"	"	"		160

him to purchase wheat to be ground at his mill on West Station, Camp Creek, in the county of Sumner, and State of Tennessee; and the said Peyton agreed that the wheat so purchased should be ground and the flour shipped to the said firm as fast as practicable, by the car load or otherwise, to be sold by the said firm, and the proceeds thereof to be accounted for; that it was agreed between said parties, that the said firm of G. Heineken & Palmore should have the exclusive sale of
20 said flour, except the sales the defendant Peyton might make at the mill by retail, and that said firm should receive the legal interest of the State of New York for the advances so made; and also $2\frac{1}{2}$ % commissions on the sales made by them, and that the money so arising from said sales made by them, less the commissions, interest, &c., should be applied to the credit of the said Peyton; and it further appearing to the court that the said Peyton, to secure the repayment of the money so to be advanced by the said G. Heineken & Palmore conveyed to the complainant W'm E. Milton, all the houses, improvements, machinery, and fixtures, and three and three-fourths acres of land, which had been conveyed to him by R. A. Chapman, by deed which was registered in the register's office of Sumner County, and one acre of ground which had been conveyed to him by Jno. F. Cage, by deed which had also been registered in said county, all of which ground and improvements are situated in the said county of Sumner, on West Station, Camp Creek, on the Nashville & Gallatin turnpike road, and about $4\frac{1}{2}$ miles west of the town of Gallatin, and it was expressly
21 stated and agreed in said contract that, in default of said Peyton to pay said advances when called on so to do, then the said Milton should sell the said property, and, after paying the necessary expenses of the trust, should apply the remainder, or so much as was necessary, to the discharge of all the liabilities of the said Peyton to the said firm of G. Heineken & Palmore, which contract was registered in the register's office of Sumner County, in book M, page 582. And it further appearing to the court that, under and by virtue of the contract, the said G. Heineken & Palmore from time to time advanced to said Peyton, sums of money, and that the said Peyton shipped to the said G. Heineken & Palmore, or to their order, flour to be sold, which they did sell, but this court is not advised as to the true state of the account between the parties.

It is therefore now ordered, adjudged, and decreed, with the consent of the parties, that it be referred to Robert W. Pritchett, as commissioner, to take and state the account between the parties, and
22 make his report thereon to this court at its next term, until the coming in of which all matters are reserved.

TESTIMONY ON PART OF COMPLAINANTS.

Deposition of Geo. W'm Palmore.

I am forty-one years of age, and reside in Brooklyn, county of Kings, and State of New York, and am one of the plaintiffs in this action, and was the junior partner of the late firm of G. Heineken & Palmore, who carried on business at 68 Broad street, in the city of New York, as commission merchants, for the last six years. I know the defendant in this suit, and have known him for the last six or eight months personally, and prior to that I knew him by reputation, and had correspondence with him. I have known him altogether about 12 months, last past. About a year ago, our agent, William E. Milton, at Louisville, K'y,

made an arrangement with Col. Balie Peyton, of Gallatin, in the State of Tennessee, the defendant in this suit, by which my said firm
23 was to furnish said defendant the sum of ten thousand dollars, to buy wheat, which was to be ground into flour by defendant, and shipped to us for sale in the New York market; and, to secure us in the advance of this amount, said Peyton executed and delivered to us a mortgage on his mills, near Gallatin, aforesaid. In pursuance of said agreement Peyton shipped us flour from time to time, amounting altogether to ten hundred and forty barrels, as appears in the statements of account hereto annexed, marked Exhibits No. 1, 2, & 3, which flour was sold at different times in the New York market, and to different persons, and for prices according to said statements. Samples of the flour were regularly drawn and exposed on 'Change in New York City for sale, where all the buyers regularly congregate, and every effort was made by us not only on "'Change," but by personal exertions among the trade generally, and the smaller dealers besides, who were not regular attendants at 'Change, thus trying our best to establish a retail as well as wholesale demand for such flour among speculators, shippers,
24 grocers, bakers, and retail dealers generally. Col. Peyton assured us that his mill was one of large capacity, and that he could ship to us a very large amount of flour, if we made it to his interest to do so. We worked hard to establish his brands, but the market was declining almost all the time, and we found it extremely difficult to sell them, particularly as there was great want of uniformity in the grades of the different brands, and a declining market. Our object was to secure Col. Peyton and a few other large shippers of flour for whom our time and labor could be used to our mutual best advantage, and for this reason we gave extra exertions in his behalf. I took a barrel of the said flour myself and had biscuit and rolls made of it, which I took with me frequently on 'Change, and showed to different buyers there, and in my office, and also to various bakers and grocers, but notwithstanding all our exertions we could not make satisfactory sales. We got full market value for every sale we made of the
25 flour shipped to us by defendant, and have conformed to the custom of the trade in all our charges, which will be found herewith annexed. I am informed that all the purchasers of said flour lost money on their purchases.

GEO. W'M PALMORE.

Exhibit No. 1 to deposition of Palmore.

Account sales 481 bbls. flour, sold for ac. of Bailie Peyton, Gallatin, Tenn.

1868.	Paid Sept. 17.	10 bbls. Peytona, @ 11 50			$115
Sept. 10,		82 " " " 11 25	922 50		
		29 lbs. light weight.....	1 66		
					920 84
14,	paid Sept. 21.	309 bls. S. Camp., @ 10 25	3,167 25		
		Light weight	13 40		
					3,153 85
15,	" " 22.	41 bls. S. Camp., @ 10 25	420 25		
		51 lbs. light weight.....	2 66		
					417 59
16,	" " 23.	39 bbls. Peytona, @ 11 40			444 60
					$5,051 88

CHARGES.

Freight	899 25	
Drayage	28 86	
Inland insurance	39 08	
Storage & labor	48 10	
Fire insurance	17 33	
Weighing & taring	9 62	
Inspection & branding	4 81	
Cooperage	24 05	
Gov't tax, 12 63; telegrams, 6 50	19 13	
Interest on freight	2 58	
Commission, 2½ %	126 30	
		1,219 11
Due Sept. 20, '68		$3,832 77

NEW YORK.—E. & O. E.

26 *Exhibit No. 2 to Palmore's depo.*

Acc't sales 551 barrels flour, sold for Balie Peyton, esq., Gallatin, Tenn.

1868.					
Oct. 17,	Peytona,	1 bbl			11 50
"	"	6 "	@ 11 25		67 50
23,	S. Camp.,	15 "	@ 10 15		152 25
"	Peytona,	30 bls.	@ 11 50	345	
			Short weight	3 65	
					341 35
29,	"	80	@ 11 25	900	
			Short weight	8 20	
					891 80
31,	"	93	@ 11 25	1,046 25	
	S. Camp.,	275	@ 10 15	2,791 25	
				3,837 50	
			Short weight	28 59	
					3,808 93
Nov. 7,	S. Camp.,	51	@ 10 00	510	
			Short weight	3 78	
					506 22
					5,779 55

CHARGES.

Freight 559 bbls	1,015 40	
Inland insurance	59 00	
Fire insurance	20 00	
Drayage	33 54	
Storage & labor	55 90	
Weighing & taring	11 18	
½ inspection, & head-branding	5 59	
Cooperage	27 95	
Interest on freight	4 47	

Gov't tax	5 78	
Commissions, 2½ %	144 50	
		1,383 31
Due Oct 31, '68		$4,396 24

NEW YORK.—E. & O. E.

27 *Exhibit No 3 to Palmore's depo.*

Balie Peyton in ac. current to Dec. 1, 1868, with G. Heineken & Palmore.

DR. 1868.				CR.
July 6.	To cash, sight draft	$2,500 00	4–25	70 49
23.	" " " "	2,500 00	4–8	62 22
Aug. 14.	" " " "	4,000 00	3–17	83 22
28.	" d'f't @ 30, d'ys, due 26 Sept.	4,000 00	2–5	50 55
Sept. 4.	" cash, sight draft	1,000 00	2–27	16 92
14.	" " " "	640 00	2–17	9 58
24.	" " " "	1,120 00	2–7	14 59
Oct. 1.	" " " "	1,120 00	2–	13 07
10.	" " " "	1,120 00	1–21	11 10
July 23.	" 500 seamless bags	270 00	4–8	6 72
	" balance of interest	263 06		
		18,533 14		338 46

CR.

1868.				
Sept. 30.	By nett sale, 481 bbls. flour	3,832 77	2–1	45 46
Oct. 31.	" " " 551 " "	4,396 24	1–	25 64
Sept. 9.	" cash from W. E. Milton	270 08	2–22	4 30
	" bal int. form contra to int. column			263 06
	" balance carried for'd	10,034 05		
		18,533 14		338 46

Dec. 1. To balance $10,034 05.

NEW YORK, *Dec.* 1, 1868.—E. & O. E.

28 *Deposition of Gideon B. Spooner.*

I am thirty-nine years of age; and reside in the city of Brooklyn, county of Kings, and State of New York; and am a book-keeper by occupation. I was engaged as book-keeper to the late firm of G. Heineken & Palmore, of the city of New York, from the time of the formation of the firm until the 1st of July last past; and, as such book-keeper, had charge of their books of account, and was conversant with all their affairs. Said Heineken & Palmore had business transactions with one Balie Peyton, of Gallatin, Tennessee. Said business transactions consisted of Heineken & Palmore selling goods on commission for said Balie Peyton, which goods were consigned to them for that purpose by said Peyton. I look upon the three several papers hereto annexed, and

marked respectively Exhibits No. 1, 2. & 3, to Palmore's depo., and say that the same are true and correct transcripts of the books of account of said Heineken & Palmore, so far as the same relates to the trans-
29 actions between them and said Peyton; that such exhibits correctly show all goods received by said Heineken & Palmore from said Peyton, together with the times when the same were so received, and the prices realized for such goods by sale thereof, and the charges & commissions in respect thereof. I am acquainted with the value of goods, of a like nature to those consigned by said Peyton to said Heineken & Palmore, in New York market, at the time such goods were sold, and say that the prices realized by said Heineken & Palmore for such goods, sold by them on account of said Peyton, were the highest market prices for the same in New York market, and that more could not be obtained for the same at the time. Said Heineken & Palmore used every exertion and dilligently sought to sell the same to the best possible advantage, and did, in fact, obtain the full market value of said goods. The charges and commissions contained in said Exhibits No. 1, 2, & 3 are reasonable and proper, and such as are usual and customary to be made in New York in respect to goods of a like nature. All just credits are given in said exhibits, and said Peyton is not entitled
30 to any credit other than that is therein given; and there is now due and owing to said Heineken & Palmore, by reason of the dealings and transactions between them and the said Peyton, the balance, or sum of ten thousand and thirty-four dollars and five cents, save and except only the account sales hereto annexed do not show the net proceeds of eight barrels of flour received by said Heineken & Palmore from said Peyton, which said eight barrels of flour were sold subsequently to the 1st December last.

GIDEON B. SPOONER.

Deposition of S. K. Burkholder.

I am fifty-four years of age; and reside in Elizabeth, New Jersey; and am a grain & flour broker, carrying on business in the city of New York, and have carried on such business there for the space of fourteen years last past. I am well acquainted with the grain and flour trade in New York City. I know Messrs. Heineken & Palmore of New York City, commission merchants, and have had business transactions with them, and from time to time sold flour for them, as their broker. In the
31 months of Sept., 1868, and October last, I sold for them 1,031 barrels of flour, in various lots and to divers persons. The flour was part "Peytona" brand, and the rest of it was "Station Camp" brand. I am well acquainted with the market price of flour in New York City in the months of Sept. & October last. The flour above referred to was sold by me at the highest price which could be obtained for those grades of flour in New York City, and was, in fact, the full market price for the same. I am now, and have been for the last fourteen years, pretty extensively *been* engaged in buying and selling flour in New York City. The list or schedule hereto annexed, marked A, is a correct list of the flour I sold for said Heineken & Palmore, and contains the names of the parties to whom I sold the same, together with the duties of sales and the prices for which the same was sold. The said flour was ununiform in quality, which operated against the sale of it somewhat, and there were complaints made to me, by every purchaser, as to the want of uniformity of quality of the flour. Mr. Palmore used his best endeavors to sell the said flour, and to realize the highest price for

the same, as I know of my knowledge, and he frequently spoke
32 to me about the sale of the same.

S. K. BURKHOLDER.

Schedule A to deposition of S. K. Burkholder.

Upon reference to my books, I find that I sold for Messrs. G. Heineken & Palmore 1,031 barrels of flour, (Tennessee,) as follows, viz:

1868.								
Sept.	10th.	To	C. M. Holcomb....	10	barrels	@.....	11	50
"	"	"	A. Hogeland & Son,	82	"	".....	11	25
"	14.	"	Holt & Co.....	309	"	".....	10	25
"	15.	"	A. Hogeland & Son	41	"	".....	10	25
"	16.	"	C. M. Holcomb....	39	"	".....	11	40
"	"	"	"	6	"	".....	11	25
"	30.	"	A. Hogeland & Son	15	"	".....	10	25
Oct.	12.	"	C. M. Holcomb....	10	"	".....	11	50
"	13.	"	do. do.	10	"	".....	11	50
"	16.	"	do. do.	10	"	".....	11	50
"	20.	"	Weeks & Freeman,	93	"	".....	11	25
"	"	"	do. do	275	"	".....	10	15
"	21.	"	C. M. Holcomb....	80	"	".....	11	25
"	28.	"	Weeks & Freeman	51	"	".....	10	00
					349 barrels "Peytona."			
				1,031	691 " "Station Camp."			

S. K. BURKHOLDER,
Broker.

Deposition of Russell C. Johnson.

33 I am twenty-six years of age, and reside in Jersey City, in the State of New Jersey, and am a partner in the firm of Weeks, Pitt & Co., flour merchants, doing business in New York City, and was formerly in the employ of the house of Weeks & Freeman, of New York, as buyer and seller of flour. I had business transactions in that capacity with Heineken & Palmore, the plaintiffs in this suit, and purchased flour from them from time to time. In October last I purchased 270 barrels of the flour called the "Station Camp" brand. It was bought by sample of Heineken & Palmore as a choice flour, but it turned out very irregular in quantity, of a low grade, and with a great want of uniformity, varying in value from two to three dollars per barrel from the cost price. The price paid for the same was the market value of a choice flour, to be uniform in quality. Said firm of Weeks & Freeman lost money on the flour so purchased of Heineken & Palmore by reason of its not being reliable and uniform. Said firm of Weeks & Freemen lost one of their best customers by selling some of the said flour to him, by reason of its running irregular in quality; one
34 barrel of flour would turn out good, and another very poor. Said firm also bought 93 barrels "Peytona" flour, for which they paid the full market value, and the highest price ruling in the market for that grade of flour at the time. I consider that said Heineken & Palmore did the best they could in the matter for the interest of the owners of the flour and obtained the full market price for the same.

RUSSELL C. JOHNSON.

Deposition of Charles M. Holcomb.

I am fifty years of age, and reside in the city of Brooklyn, county of Kings, and State of New York. I am engaged in buying and selling flour as a dealer, and have been engaged in that business in New York City for twenty-five years last past and upwards. I am acquainted with the firm of Heineken & Palmore, of New York City, and have had business transactions with them. I have known Heineken & Palmore for about two years last past. On the 10th day of Sept., 1868, the
35 16th day of same month of September, the 6th day of October, 1868, the 12th day of same month, (October,) the 13th, 16th, & 21st days of same month, (October.) I purchased flour from said firm of Heineken & Palmore, in all amounting to 165 barrels. I am now, and was at the several times of the purchases by me of said flour, well acquainted with the market value of flour in New York City, and with the qualities of the same. The 165 barrels so bought by me of Heineken & Palmore were all of the brand called "Peytona." I paid for the same the full market value of such flour at the time, would have bought more of such flour if I had considered it low in price, as it was stored in my warehouse; but I could do better elsewhere, and could, and in fact did place other flour fully as good as Peytona flour at a lower price than I could obtain Peytona flour from said Heineken & Palmore. I examined flour of the brand called "Station Camp," with a view to purchase the same, but I declined to purchase any flour of that brand in consequence of the great want of uniformity of quality, and did not buy any for that reason. Heineken & Palmore used every effort to induce me to purchase such flour.

CHARLES M. HOLCOMB.

36 *Deposition of Stephen G. Searls.*

I am forty-eight years of age, and reside in New York City, and am a member of the firm of Holt & Co., flour merchants, doing business at No. 57 Wall st. in said city of New York. In the month of September, 1868, my said firm purchased of Heineken & Palmore, 309 barrels of Station Camp brand of flour. The same was purchased by us to fill an order, and we paid for the same ten dollars and twenty-five cents per barrel, which we consider to have been its full market value at the time in New York City. I was thoroughly acquainted with the ruling market prices for flour in New York City at the time of such purchases by us.

STEPHEN G. SEARLS.

Deposition of A. Hoagland.

I am upwards of 54 years of age, and reside on Long Island, in the State of New York. I am now not engaged in business. In the month of Sept., 1868, I was a member of the firm of Hoagland & Son,
37 of New York City, dealers in flour. I know the firm of Heineken & Palmore, late of New York City. My said firm of Hoagland & Son bought, through Mr. Burkholder, a broker, in said month of Sept., 1868, 138 barrels of flour, 82 of which were of the brand called Peytona and the remainder were of the brand called "Station Camp." My said firm paid the full market value for such flour at the time ruling in New York City. The Station Camp flour run uneven in quality. I

was thoroughly acquainted with the value of flour, and the market price for the same, in New York City in September last.

A. HOAGLAND.

Deposition of Jno. J. McCann.

Question. State your occupation in the year 1868, and where you resided. Are you and were you well knowing of the value of flour here and in New York during that (1868) year, and the usages and prices charged by flour merchants in New York in that year; did you send any flour to New York in 1868 to be sold? If so, to whom, and
38 state their standing. Have you an account of sales rendered you? If so, file it with your answer, and state the character and quality of the flour so sent to New York, and also state whether you know the character and quality of the flour manufactured by the defendant, Balie Peyton, and known under the brand of Peytona. Please state in one answer everything you know material to either plaintiff or defendant in this cause.

Answer. I was and still am the owner and proprietor of a steam flouring mill in the city of Nashville, in the year 1868, and am called a miller. I then and now reside in the city of Nashville. I was as well acquainted with the prices of flour in New York and here, and the usages and charges in the sales thereof, as most dealers were. I shipped to New York in 1868, some 1,500 to 2,500 barrels of flour; a portion was shipped to the firm of Hooper, Harris & Co., and a portion to W. H. Little & Co.; both firms were then and now are in good standing. I have filed an account of sales from Hooper, Harris & Co., which I desire to
39 make a part of this answer, as to prices and charges of selling. The "Okalona" flour was not as good as Peytona, nor was the "Gold Dust," in my opinion, but the "Gem of the Burg" I regarded as better flour than the Peytona. The year 1868 was a disastrous year on millers, and it was difficult for a commission merchant to give satisfaction. I thought hard of my correspondents for selling me out and entailing such heavy losses upon me, but experience demonstrates that they were right and I was wrong. Flour has been continually declining for two years. I do not think the Peytona would have brought exceeding 50 cents per barrel more in any market than the Gold Dust. My Gem of the Burg sold more readily here than Peytona, at an advance of 50 cents per barrel over that brand. The prices obtained by Little & Co. were a shade better than those obtained by Harris. I think about $1 00 per barrel, growing out of the fact that they sold before the decline was so marked. I have no copy of this account. There charges were about the same as Harris's with the exception that Harris charged 5 cents per barrel brokerage, which Little & Co. made no charge
40 for.

JNO. J. McCANN.

(Defendant's counsel excepts to the answer of the above witness so far as concerns the ac. of sales from Hooper, Harris & Co., as the same is in the nature of hearsay testimony. And he also excepts to so much as *expenses and* opinion about its being difficult to be pleased by a commission merchant. Also to the answer, "That I do not think that the Peytona would have brought exceeding 50 cents per barrel, in any market, than the Gold Dust." This is not responsive to any question asked.)

Account of sales mentioned in deposition of John J. McCann.

Sales of 218 barrels of flour per ac. of John J. McCann, by Hooper, Harris & Co.

1868.

Dec. 14,	218 barrels Okolona, @ 7 50		$1,635 00
	Less allowance for short weight, and damaged worse than sample		36 80
			1,598 20

CHARGES.

41	Marine insurance, $2,180 @ ¾ %	16 35	
	Fire " $2,180 @ ¼ %	5 45	
	Cartage & weighing, @ 8 c	17 44	
	Head branding, @ 1 c	2 18	
	Storage & labor, @ ⅘	21 80	
	Mending cooperage, @ 5 c	10 90	
	Inspection, @ 2 c	4 36	
	Brokerage, @ 5 c	10 90	
	Gov't tax, $1,635 00, @ 1/10 %	1 64	
	Commission, $1,635 00, @ 2½ %	40 80	
			131 90
	Net proceeds to cr., 21 Dec., 1868		$1,466 30

New York, Jan'y 30, 1869.

HOOPER, HARRIS & CO.,
Per THROP, JR.

Sales of 200 bbls. flour per ac. of Jno. J. McCann, esq., by Hooper, Harris & Co.

1869.

Jan'y 26,	100 barrels Gem of the Burg, @ 9 75	975 00
" 30,	100 " " " @ 9 40	940 00
		1,915 00

Not delivered; short weight to be hereafter ascertained.

CHARGES.

	Freight & charges on 200 barrels	$240 00	
	Marine Insurance 2,000$, ¾ %	15	
	Fire " 2,000$, ¼ %	5	
	Cartage & weighing, @ 8 c	16	
	Storage & labor, 2 months, ⅘	30	
42			1,915 00
	Head branding, @ 2 c	2 00	
	Mending & cooperage, @ 5 c	10 00	
	Inspection	4 00	
	Brokerage, @ 5 c	10 00	
	Interest on disbursements of 240 days, @ 40.7 %	1 84	
	Gov't tax $1,915, @ 1/10 %	1 92	
	Commissions on $1,915, @ 2½ %	47 88	
			388 64
	Net proceeds to cr. as cash, this day		$1,531 36

New York, Jan'y 30, 1869.

HOOPER, HARRIS & CO.
Per THROP, JR.

Sales of 1,022 barrels Gold Dust flour per ac. of Jno. J. McCann, esq., by Hooper, Harris & Co.

Av'g date.		
Dec. 31st, 1,022 barrels, average @ 9 45		9,666 25
Less average short weight 2,* 2,044 @ 9 45		86 46
		$9,579 79

CHARGES.

Freight and charges on 1,240 barrels		18 16	
Marine insurance, $10,220, @ $\frac{3}{4}$		76 65	
Fire " 60 d'ys $10,220, @ 40 c		40 88	
Cartage & weighing, @ 8 c		81 76	
Head branding, @ 1 c		10 20	
Storage & labor, 2 mo's, @ $\frac{5}{5}$		153 30	
Mending cooperage, @ 4 c		40 88	
Inspection, @ 2 c		20 44	
Brokerage, @ 5 c		51 10	
Interest on disbursements, $2,015 29; days 24, @ 7 %		9 42	
43 Gov't tax, $9,579 79, @ $\frac{1}{10}$ %		9 58	
Commission, $9,579, @ $2\frac{1}{2}$ %		239 47	
			2,549 70
Net proceeds to cr., Dec. 28, 1868			$7,030 09

New York, January 30, 1869.

HOOPER, HARRIS & CO.,
Per THROP, JR.

Deposition of A. J. Gilbert.

Question. State if you sold any meal of Col. Peyton's for G. Heineken & Palmore; if so, when and how much? Was the meal, or any part of it, damaged or not. What were the expenses of selling said meal? In a word I want you to state the gross and nett amounts of said sales.

Answer. I was employed by Messrs. M. A. Parrish & Co., in the year 1869, and they sold a lot of meal for account of Messrs. G. Heineken & Palmore, of New York; said meal was received by Mr. Balie Peyton; there was a portion of said meal damaged; the whole lot of meal sold for two hundred and three $\frac{55}{100}$ dollars, ($203 55,) and the expense for same was thirty-nine $\frac{29}{100}$ dollars, ($39 29,) leaving a balance of one hundred and sixty-fo'r $\frac{26}{100}$ dollars to the credit of Messrs. G.
44 Heineken & Palmore. I was the book-keeper, and know the above to be correct, the sales of meal occurred from Feb'ry to July, 1869.

A. J. GILBERT.

Affidavit of G. B. Spooner.

UNITED STATES OF AMERICA,
City, County, and State of New York, ss:

Before me, the undersigned, a commissioner, &c., in and for the State of New York, duly appointed by the governor of the State of Tennessee, with authority to administer oaths, &c., and to take depositions to be

used in that State, personally appeared Gideon B. Spooner, who, being by me duly sworn, did depose and say that he is the book-keeper of the firm of G. Heineken & Palmore; that the foregoing and annexed account, marked "A," between the said G. Heineken & Palmore and Balie Peyton, of Gallatin, Tennessee, is correctly made out from the books of original entry of said firm; that the charges are correct, and the account just and true as stated; and that there is now due and owing thereon to the said G. Heineken & Palmore, from said Balie Peyton, the sum of seventy-five hundred and thirty-one $\frac{83}{100}$ dollars, with
45 lawful interest thereon, no part of which said sum or interest has been paid or in any manner settled, and that there are no deductions or offsets of any kind; and that said G. Heineken & Palmore hold no personal or collateral security or satisfaction whatever for or on account of said claim, and said claim is just, true, and fair.

G. B. SPOONER.

Subscribed and sworn to before me this 14th day of Dec., 1869, as witness my hand and official seal.

[OFFICIAL SEAL.]

NATHANIEL GILL,
Comm'r for Tenn. in New York.

Papers marked "A" to affidavit of G. B. Spooner.

Sales of 8 barrels of flour rec'd by R. R., and sold by G. Heineken & Palmore, of New York, by order and for ac. of Balie Peyton, of Gallatin, Tenn.

1868.			
Dec. 12.	1 barrel Station Camp, cash		$7 00
1869.			
Jan'ry 4.	7 " " " at auction	$45 50	
	Less auction fees	2 51	
			42 99
			49 99

CHARGES.

Fire insurance	75	
Cooperage	80	
Storage & labor	64	
Commissions 2½ %	1 25	
		3 44
		$46 55

New York. E. & O. E.

G. HEINEKEN & PALMORE, (in liq.)

46 Balie Peyton, esq., in ac. current with G. Heineken & Palmore.

1869.		
Dec. 1.	To bal. of ac. rendered	10,034 05
1869.		
Feb'y 29.	" commission, 2½ % on 160 bls. flour, sold in Atlanta	43 94
		$10,977 99

Cr.

1869.			
Feb'y 4.	By cash		450 00
M'ch 2.	" "		475 00
Ap'l 5.	" "		179 83
	Nett proceeds 80 bls. meal		164 26
Aug. 7.	Cash from Lochram & Clark		1,230 52
	" nett sale 8 bls. flour		46 55
			$2,546 16

"A."]

NATHANIEL GILL,
Comm'r for Tennessee in New York.

TESTIMONY OF DEFENDANT.

Deposition of John Bell Peyton.

Ques. 1st. Have you, as agent for defendant, made any payments to complainants? If so, state the times and amounts of such payments.

Answer. On January 13, 1869, I paid W'm E. Melton, agent of
47 complainants, four hundred and fifty dollars' cash. On 5th of Feb'y, 1869, I paid G. W. Palmore fifty dollars in cash; and on the same day I paid, at the Bank of Nashville, to the credit of G. W. Palmore, two hundred and twenty-five dollars. On the 15th of Feb'y, 1869, I delivered on the cars, at Sandersville, Tenn., 80 barrels of corn-meal, for which Mr. G. W. Palmore agreed to allow defendant three dollars per barrel, delivered on the cars at Sandersville, Tennessee. Sixteen barrels of said corn-meal was said to be damaged, and I agreed to deduct the amount of damage, to be ascertained by John J. McCann, of Nashville. Mr. Palmore and myself, afterwards, agreed that Mr. Parrish should sell the sixteen barrels of damaged meal, and pay Mr. Palmore the proceeds thereof. I called on Mr. Parrish this morning, but, his bookkeeper being absent, I was unable to get the account for the 16 barrels. On the 23 Jan., 1869, I endorsed a check of Dodd & Simmons, of Edgfield, to Mr. G. W. Palmore, for three hundred dollars, payable 30 days after date, at the Bank of Nashville, which check was duly paid to Mr. Palmore. On the same date I gave another check to the
48 said Palmore, of the same parties, for one hundred and eighty $\frac{33}{100}$ dollars, which said check was paid, at the Bank of Nashville, to Messrs. Heineken & Palmore, on 27 March, 1869. The payment heretofore mentioned of two hundred and twenty-five dollars, made on the 5th of Feb'y, 1869, at the Bank of Nashville, consisted of one item of $175 00 cash, and the note of W. O. Driver for $50 00, which note having been protested, was taken up by me, and I paid the amount of said note at the Bank of Nashville. On 29 Sept., 1868, I shipped W. E. Milton, for complainants, Louisville, Ky., 14,135 pounds of wheat bran. On 7 Oct., 1868, I shipped to same party, 34,206 pounds of wheat bran to be sold, and the money turned over to G. Heineken & Palmore. Mr. Milton did not report the amount of proceeds of sales, or what he did with the proceeds. He acknowledged the receipt of the bran. From my information bran was worth, at that time, in Louisville, $17 00 per ton. I was offered that price in Louisville about that time. I do not know the cost of freight. I directed Mr. Milton to apply to Mr. Fink,

sup't L. & N. R. R., for $189 40, amount of drawback on flour. Mr.
49 Fink wrote me afterwards that that amount had been paid.

(G. Heineken & Palmore, by their solicitor, excepts to the taking of the foregoing deposition of Mr. Peyton, and upon the following grounds:

1st. It was taken on the the last day but one before the meeting of the court, when the complainants had no time to rebut any statement made, and when the report could not be made by the commissioner in time to be confirmed at the next term of the court. And because also the evidence has already been taken and the report made, and evidence that related to but those points, (i. e. the value of the damaged meal, the nett proceeds of the flour sent to Atlanta and the resales of the flour sent to Shelbyville,) could be taken outside of the report already made. They also object to the opinions and hearsays obtained by Mr. Peyton; but being overrulled by the commissioner, without waiving their rights, they proceed to cross-examine as follows:

Question. Have you or your father paid any money to G. Heineken & Palmore, or to either of said firm since the answer of your father was filed to the bill; and if so, how much, and to whom? State also,
50 if you took receipts; if so, file them.

Answer. The only payments made by me, are mentioned in my examination-in-chief. I don't know whether my father has made any payments or not. I got a receipt from Mr. Milton for the $450 00 mentioned. Also, a receipt from the Bank of Nashville, for the $175 00 mentioned heretofore, and a memorandum from Mr. Hobson, president of the Bank of Nashville, showing the amounts Mr. Palmer received at said bank from me, including *including* the $175 00. All of my receipts are in the hands of Mr. East, the solicitor of my father in this suit. I file herewith the memorandum of Mr. Hobson, marked Exhibit "A." Mr. Palmore acknowledged to me that he had received the $450 00 paid by me to Mr. Milton.

Question. How do you know that the check of Dodd & Simmons for $300 was paid to Palmore; what evidence of this fact have you?

Answer. In the first place I endorsed the check to Mr. Palmore and I never heard of it afterwards. I went to Mr. Hobson this morn-
51 ing and he showed me Heineken & Palmore's account on his books; the memorandum Exhibit "A," is a copy of that account.

J. B PEYTON.

Exhibit "A" to deposition of J. B. Peyton.

The annexed sums were paid to the cr. of G. Heineken & Palmore, as per dates annexed, viz:

1869.			
Feb'y	5	By Mr. Peyton	175 00
		" W. O. Driver	50 00
	26	" Dodd & Simmons	300 00
Ap'l	27	" do	180 33
			$705 33

N. HOBSON, *President.*

Deposition of H. T. Massengale.

I am a citizen of Nashville. I have been engaged in the business of commission merchant, in the grocery & produce business, and also in the milling business, and I was so engaged last year. I sold flour last year, (that is, 1868,) in the months of Sept., Oct., Nov., & December, in New York. I sold flour through the house of L. R. Finch & Sons during said months. We did not send our best flour to New
52 York. Our best flour is our "Mountain Dew" brand, which we kept for home consumption. The flour we sent to New York, the best brand was the "Cream of the City," a standard family flour, made at Reservoir Mills, in the city of Nashville. The flour above indicated in the month of Sept., in New York, at 13$ per barrel. I sold 160 barrels at those rates, which netted us here $10 73½ per barrel; in New York, we sold *in New York*, 80 barrels, at $12 50, which netted us here $10 45⅝, also, 80 barrels in Sept. 1868, at $12 75, $13 00, and $12 25, which netted us here, $10 22½; also, in Nov. 1868, 80 barrels, at $12 50, which netted us here, $10 48; also, in Dec'r, 1868, we sold 158 barrels, at $12 50; 1 barrel at $12 75, and 1 barrel at $13 00, which netted us here, $10 44. We held and sold our "Mountain Dew" brand, one dollar per barrel higher than the "Cream of the City" brand. The "Mountain Dew" brand, was too fancy and fine for New York market, and we never tried that brand in New York, for the reason that brand had no established reputation in New York, and we could not come in competition with established brands of the same grade of flour. My
53 recollection of the flour market is that it was very steady, both in eastern markets and here, until the end of the year 1868, when it declined; I am however not positive. I also sent several thousand barrels of flour to New York during the same months; that is, we commenced sending as soon as we commenced grinding in July, and it was all sold at the above rates deposed to. We did send 50 barrels of "Mountain Dew" during that time, and limited it in price; as it did not bring the price placed on it, we sold it to a Savannah house. I don't remember the price I rec'd for the said 50 barrels. I make the following letter, marked Exhibit A, part of my deposition, the same being addressed to the defendant, Bailey Peyton, from Heineken & Palmore, (it being admitted as genuine by the counsel of complainants.)

(The complainants object to the above testimony as illegal and assign as one of the grounds of illegality that it is wholly irrelevant; but, without expressing all the grounds of their objection and not waiving any of their rights, proceed to cross-examine, as follows:)

54 Question 1st. Please state the items of expense for selling your flour, and if you have no objection, file with your deposition the accounts of sales of your factors.

Answer. I herewith file my account of sales, marked exhibits 1, 2, 3, 4, 5, which will of themselves answer the above question.

Question 2nd. Does not flour, the brand of which is established where sold, sell more readily and for a better price than an unknown flour. I mean a flour unknown to the market where sold, and whose brand is not established there?

Answer. Yes, sir; it does.

Question. How long had you been sending flour to New York to be sold on commission?

Answer. Last year was the first I ever sent.

Question. Was the Cream of the City a new flour in New York last year or was its brand established?

Answer. I don't know that a barrel of said brand of flour ever
55 went to New York until we sent it It may have done so.

Question. Do you know anything about the efforts of G. Heineken & Palmore to sell Col. Peyton's flour for the best price they could get?

Answer. I know nothing.

Question. Did you see the flour shipped by Col. Peyton to G. Heineken & Palmore to be by them sold?

Answer. I did not.

Question. What do you mean by saying that you did not send more barrels of your "Mountain Dew" to New York to be sold, because its brand was not known, when you sent the Cream of the City there to be sold whose brand was equally unknown.

Answer. Because "Cream of the City" was a standard family brand, and sold on its merits. The other, "Mountain Dew," was a fancy brand and commanded a fancy price where it was known.

Question. Were the charges for selling your flour reasonable
56 and usual—I mean the charges as they appear in the account of sales which you have filed?

Answer. They were reasonable and usual.

Re-examination:

Question. How did you send your flour to New York, by rail or water?

Answer. Most usually we shipped our flour over the Louisville & Nashville R. R.

H. T. MASSENGALE.

Letter.—Exhibit "A" to deposition of H. T. Massengale.

NEW YORK, *Aug't* 29, 1868.

Col. BALIE PEYTON, *Gallatin, Tenn.*

D'R SIR: Your two favors, under dates, respectively, of the 3 & 18 insts. have been duly rec'd, and we delayed replying until your first consignment of flour arrived. This morning we got notice of 100 barrels, (36 Station Camp and 64 Peytona,) which we immediately had sampled and have been trying hard to sell from dock without
57 storing, but have not yet succeeded, as Saturday is always a bad day to sell here, and particularly so when the market during the whole week has been quiet and declining. Several dealers & bakers have seen the samples and we are much pleased to report that it gives good satisfaction, and we have strong hopes of getting the bakers here to use it in place of the "Gallego," after we get the brand well introduced here. It is certainly very nice flour, and if you will keep the standard fully up we shall soon be able to sell the flour "to arrive" by the brand, thus saving you considerable expenses in the way of storage, drayage, &c., &c. By the way, these little items are of much importance, and every one saved to you is that much gained, and we therefore call your attention to the freight on these 100 barrels, which is $211 25, or $2 11 per bbl., and having no B. L. for this lot, we had no alternative but to pay it. We rec'd yesterday a B. L. from Mr. Milton for 80 barrels flour with the rates stipulated at $1 85½; but Mr. M. wrote us under date of 30th July that he had engaged your flour at a through rate from Gallatin here of $1 80; and even this rate we think is too much. We shall
58 write to Mr. Milton and call his attention to the matter of freight, &c., on your flour. It would facilitate us in selling your flour if

you would send it on in round full lots, say 1 to 500 bbls. at a time, and at regular periods, so that we may prepare customers for their arrival several days in advance. We trust you are running your mills night and day and turning out all you can. Send us on some of the "Extra" and we then can advise whether to ship it here or at Louisville. There are times when we can get relatively better prices for lower grades than the better, so you should keep us constantly supplied with at least 3 grades and ship as rapidly as possible.

Yours, resp'y, &c.,

G. HEINEKEN & PALMORE.

Exhibit 1 *to deposition of H. T. Massengale.*

Account sales of 160 barrels Reservoir Mills flour, on account and risk of Messrs. Driver, Douglas & Co.

Aug. 17,	15	bbls.	½	inspection,	07, S. Valentine & Sons.	$12 75	$191 32
" 19,	10	"	"	"	05, A. M. Aldrich.....	13 15	131 55
" 24,	15	"	"	"	08, "	13 00	195 08
59							
" "	20	"	"	"	10, G. & J. McMurtry ..	13 00	260 10
" 28,	20	"	"	"	10, A. N. Aldrich	13 00	260 10
" 31,	25	"	"	"	13, G. & J. McMurtry ..	13 00	325 13
Sept. 3,	25	"	"	"	13, Salisbury & Gladding	13 00	325 13
" 9,	30	"	"	"	15, Davis & Benson	12 75	382 65
							$2,071 06

CHARGES.

To transportation.....	259 20	
" inspection, 1 60; head branding, 80.....	2 40	
" hoops & cooperage.....	3 97	
" cartage to store.....	8 00	
" storage & labor.....	12 80	
" fire insurance.....	5 18	
" Gov't tax	2 07	
" commissions, 02½ %.....	51 78	
		345 40
Net proceeds to acc't.....		1,725 66

DR.

Aug. 10. To sight draft	1,200 00	
Sept. 11. " dif'erence in interest.....	7 89	
		1,207 89
		$517 77

New York, Sept. 11, 1868.

L. R. FINCH & SONS,
WARNER.

Exhibit 2 to deposition of H. T. Massengale.

Account sales of eighty barrels Reservoir Mills flour on account and risk of Messrs. Driver, Douglas & Co.

60

Sept. 30	bbls. ½	inspection,	15,	G. & J. McMurtry,	12 50	375 15
Oct. 50	" "	"	25,	"	12 50	625 25
						$1,000 40

CHARGES.

To transportation	112 00	
" inspection, 80; head branding, 40	1 20	
" hoops & cooperage	1 87	
" cartage to store	5 60	
" storage & labor	6 40	
" light weight	2 30	
" fire insurance	1 97	
" Gov't tax	1 00	
" commissions, 02½ %	25 01	
		157 35
Net proceeds to ac		$843 05

DR.

Sept. 8. To sight draft	600	
Oct. 31. " difference in interest	6 47	
		606 47
		236 58

New York, Oct. 31, 1868.

L. R. FINCH & SONS.
WARNER.

Exhibit 3 to deposition of H. T. Massengale.

Account sales 80 barrels Reservoir Mills flour on acc't and risk Messrs. Driver, Douglas & Co.

Sept.	10	bbls	½	inspection,	05, Davis & Benson	12 75	127 55
	10	"	½	"	05, Winchester & Cole	13 00	130 05
61	60	"	½	"	30, Valentine & Sons	12 25	735 30
							992 90

CHARGES.

To transportation	129 60	
" inspection, 80; head branding, 40	1 20	
" hoops & cooperage	1 83	
" cartage to store	4 00	
" storage & labor	6 40	
" fire insurance	2 43	

" Gov't tax		99
" commissions, 02½ %		24 82
		171 27
Net proceeds to ac		821 63

DR.

Sept. 3. To sight draft	600	
" 30. " difference in interest	4 10	
		604 10
		$217 53

New York, Nov. 12, 1868.

L. R. FINCH & SONS,
WARNER.

Exhibit 4 to deposition of H. T. Massengale.

Account sales 80 barrels Reservoir Mills flour on acc't and risk of Messrs. Driver, Douglas & Co.

Sept.	30 bbls	½	inspection, 15, G. & J. McMurtry,	12 50..	375 15
	25 "	½	" 13, do.	12 50..	312 63
	25 "	½	" 13, E. G. Stoddard,	12 50..	312 63
					$1,000 41

CHARGES.

To transportation	112 00	
" inspection, 80; head branding, 40	1 20	
" hoops & cooperage	1 94	
To cartage to store	5 60	
62 " storage & labor	6 40	
" fire insurance	1 97	
To Govt. tax	1 00	
" commissions, 02½ %	25 01	
		155 12
Net proceeds to ac		845 29

CR.

Nov. 12. By interest to date	1 48
	846 77

DR.

Sept. 15. To sight draft	600	
Nov. 12. " interest to date	8 57	
		608 57
		238 20

New York, Nov. 12, 1868.

L. R. FINCH & SONS,
WARNER.

Exhibit 5 to deposition of H. T. Massengale.

Account sales 160 bbls. Reservoir Mills flour on acc't and risk of Messrs. Driver, Douglas & Co.

5 bbls.	½	inspection,	03, G. & J. McMurtry, 12 50..	62 53	
63	½	"	31, sundry parties, 12 50	787 81	
1	½	"	E. Vanderbuilt, 12 75....	12 75	
1	½	"	E. Hydecker, 13 00	13 00	
90	½	"	45, A. Hogeland & Son, 12 50.	1,125 45	
					2,001 54

CHARGES.

To transportation	224 00	
" inspection, 1 60; head branding, 80.....	2 40	
63		
" hoops & cooperage	4 23	
" cartage to store	11 20	
" storage & labor.....	18 16	
" fire insurance	5 24	
" Gov't tax.....	2 00	
" commissions, 02½ %	50 04	
		317 27
Net proceeds to ac.....		1,684 27

CR.

Dec. 4. By interest to date.....	5 03
	1,689 30

DR.

Sept. 24. To sight draft.....	1,200	
Dec. 4. " interest to date.....	19 27	
		1,219 27
		$470 03

New York, Dec. 4, 1868.

L. R. FINCH & SONS,
WARNER.

Deposition of Madison Stratton.

I reside in the vicinity of Nashville; have been engaged in various sorts of mercantile business in Nashville for twenty odd years. I was engaged in the years 1867 & 1868 in the commission and milling business. I sold flour last year in the city of New York during the months of Sept., Oct., Nov'r, & December, 1868, and January, 1869. I
64 sold through the house of Fielding, Gwinn & Co., commission merchants in New York. I don't remember the quantity of flour I sold in New York. I sold in Sept. the "Pride of Tennessee" brand, 36 barrels, 13 35 to 14 00 per barrel. In the month of Oct. I sold 188 barrels same brand from 13 25 to 13 50. In the month of November I sold 8 barrels same brand for 13 00. In the month of December I sold

731 barrels at 12 50 per barrel. In January, 1869, I sold 12 barrels at 12 50 per bbl. And I hereby exhibit the account of sales of my flour with Fielding, Gwinn & Co., and make them part of my deposition, marked E. & F. I shipped all my flour by the Louisville & Nashville Railroad. My recollection is, I shipped nearly all. I have examined the account of sales furnished by G. Heinecken & Palmore to B. Peyton, which are herewith filed, marked G. & H., and they differ in some of the charges from the accounts of sales furnished me by my commission merchants. The two accounts, which are filed, will show the
65 difference between the accounts, and I presume the charges in my accounts of sales *is* the charges usual in New York. The flour contained in my account of sales is the first flour sent to New York by me. I was well acquainted with the "Peytona" brand of defendant's flour. I sold it in the year 1867. I saw a sample of said brand in 1868. I saw it several times during that year, but don't remember the dates. The quality of that flour was good; it stood high here. I sold a good deal of that flour myself in the year 1867. There was not a great deal of difference in the quality of those three brands of flour, viz: "Cream of the City," "Peytona," and "Pride of Tennessee." By taking the same interest in the sale of the flour, there would be very little difference in their prices in the Nashville market.

(The complainants object to so much of the statement of Col. Stratton as relates to the sales and prices of his own flour, and one of the grounds of their objection is that it is irrelevant; but, without waiving their objections, they cross-examine as follows:)

66 Question. Do you know G. Heineken & Palmore, the complainants?

Answer. I do not know them.

Question. Did you see the flour Col. Peyton sent to G. Heineken & Palmore to be sold in New York?

Answer. I did not see it.

Question. Do you know whether the Peytona was an established brand of flour, and known to buyers in New York prior to the times that flour was sent to complainants?

Answer. I do not know.

Question. Suppose those different kinds of flour, or rather three different brands of flour of the same grade are put in the hands of different agents for sale, may they not sell at different prices in the same city, and yet all the agents be equally honest and anxious to do their duty?

Answer. It is sometimes the case that some house excels the
67 others in the sale; but where there is much competition there should not be much difference in the prices of sale.

Question. If a baker, for instance, or the head of a family commences using a flour of a good brand, does he easily or readily change the brand for another unknown to him?

Answer. They usually prefer to continue to use the article they are accustomed to.

Question. Did you not, since your examination commenced, hear Col. Peyton (the defendant) say that he only wished you to speak of his best brands of flour; that he made no complaint as to the sales of his flour with the brand of Station Camp, but would confine himself to that of Peytona, though he did not wish to make any admission?

Answer. I heard Col. Peyton say he wanted me to speak of my best brand of flour, which was "Pride of Tennessee." I did not understand anything else.

68 Question. Did you not send another brand, of inferior grade, to New York, with your Pride of Tennessee, and did it not sell for a less price, and have you been asked a word about the inferior grade?

Answer. I sent two grades inferior to the Pride of Tennessee, which brought a less price. I have been asked no questions about the lower grades by defendant.

Question. Do you know whether or not the complainants (G. Heineken & Palmore) got the best price for the Peytona that they could have gotten?

Answer. I do not know.

Question. Do you know the charges, &c., of commission merchants in New York City, and can you say whether or not the charges are reasonable or otherwise which are specified in the bills of sale which Col. Peyton just showed to you, and which you made and exhibit to this deposition?

69 Answer. I am not very familiar with the charges of commission merchants of New York on flour. In accordance with the charges in New York, I do not know whether the charges made in said bills against Col. Peyton are reasonable or not?

Reëxamination:

Question. Had your flour, the "Pride of Tennessee," an established reputation when sold in New York, or not

Answer. It had not.

MADISON STRATTON.

Exhibit E to deposition of M. Stratton.

Sales of 244 barrels of flour, by Fielding, Gwinn & Co., for a'c of Mr. Madison Stratton, Nashville, Tenn.

1868.							
Sept. 9.	Pride Tenn.,	6 bbls.	flour,	@ 14 00....	84 00		
" 18.	Do. do.	20 do.	do.	@ 13 50....	270 00		
22.	Do. do.	30 do.	do.	@ 13 35....	450 00		
"	Clear Lick,	47 do.	do.	@ 11 00....	517 00		
Oct. 6.	Pride Tenn.,	110 do.	do.	@ 13 25....	1,457 50		
8.	Do. do.	2 do.	do.	@ 13 50....	27 00		
"	Clear Lick,	3 do.	do.	@ 10 00....	30 00		
9.	Pride Tenn.,	26 do.	do.	@ 13 25....	344 50		
						3,130	50
70						3,130	50
Less light weight,.....					8 10		
Allowance for 1 B. B. bbl., ...					50		
						8	60
						$3,121	90

CHARGES.

Freight on 320 bbls.....	502 00
Inspection & head branding, 244 bbls., @ 1c.....	2 44
Inland insurance, $3,000, @ ½ %.....	15 00
Drayage, 214 bbls., @ 6c.....	12 84
Interest on disbursements, $532 28, 30 d., @ 7 %....	3 11
Fire insurance, 3,130 50, 1 mo., @ $\frac{100}{20}$ %.....	6 26
Cooperage, @ 34 bbls.....	7 32

Coopering on dock	3 00	
Storage & labor, 214, 1 mo. @ ¼	17 12	
Gov't tax, $3,121 90, @ $\frac{1}{10}$ of 1 °/₀	3 12	
Commission, $3,121 90, @ 2½ °/₀	78 04	
		650 25
Net proceeds to cr. of Mr. M. Stratton, Oct. 7		$2,471 65

E. & O. E. New York, Oct. 16, 1868.

FIELDING, GWINN & CO.,
Per A. EBERT.

Exhibit "F" to deposition of M. Stratton.

Sales of 627 bbls. flour, by Fielding, Gwinn & Co., for ac. of Mr. Madison Stratton, Nashville, Tenn.

1868.						
Oct. 17.	Pride Tenn,	50 bbls.,	*a* 13 25	662 50		
" 24.	Pomona,	58 "	*a* 9 75	565 50		
" "	Conservative,	20 "	*a* 11 00	220 00		
" 29.	Do.	298 "	*a* 10 90	3,248 20		
71						
" "	Pomona,	10 "	*a* 6 50	65 00		
Nov. 20.	Pride Tenn.,	8 "	*a* 13 00	104 00		
Dec. 18.	Do.	73 "	*a* 12 50	912 50		
" "	Pomona,	28 "	*a* 6 50	182 00		
" 23.	Do.	61 "	*a* 6 50	396 50		
" "	Do.	9 "	*a* 5 40	48 60		
1869.						
Jan'y 13.	Pride Tenn.,	12 "	*a* 12 50	150 00		
						6,554 80
Less light weight, 76 lbs.		Pomona		3 70		
" " "	302 "	Conservative		16 80		
						20 50
						$6,534 30

CHARGES.

Freight on 560 bbls	840 00	
Inspection & head-branding, 1c	6 27	
Inland insurance, $6,270 *a* ½ °/₀	31 35	
Drayage, 627 bbls. *a* 6c	37 62	
Interest on disbursements, 915 24, 60 d's *a* 7 °/₀	10 67	
Fire insurance, 6,554 80, 2 mos., *a* $\frac{100}{30}$ °/₀	19 66	
Covering on dock, 4 covers, *a* 75c. ea	3 00	
Cooperage, *a* 3c	18 81	
Storage & labor, 627 bbls., av'ge 2 mos., $\frac{10}{5}$	94 05	
Extra labor, assorting	21 12	
Gov't tax, 6,554 80, *a* $\frac{1}{10}$ of 1 °/₀	6 55	
Commissions, 6,554 80, *a* 2½ °/₀	163 85	
		1,252 95
Net proceeds to cr. Mr. M. Stratton, Nov. 17, 1868		$5,281 35

E. & O. E. New York, Jan'y 13, 1869.

FIELDING, GWINN & CO.,
Per A. EBERT.

Exhibit G to deposition of M. Stratton.

72 Account sales 481 bbls. flour, for a/c of Balie Peyton, esq., Gallatin, Tenn., by G. Heineken & Palmore, New York.

1868.

Sept 10.	*Paid*	Sept. 17.	10 bbls., Peytona, *a* 11 50				115 00
			82 " " *a* 11 25.		922 50		
"			29 lbs. light weight		1 66		
							920 84
" 14.	"	Sept. 21.	309 bbls., Station Camp, *a* 10 25		3,167 25		
			light weight,		13 40		
							3,153 85
" 15.	"	" 22.	41 bbls. S. Camp, 10 *a* 25		420 25		
			51 lbs. light weight		2 66		
							417 59
" 16.	"	" 23.	39 bbls. Peytona, *a* 11 40				444 60
							5,051 88

CHARGES.

Freight	899 25	
Inland insurance, 5,211, *a* ¾ %, 39 08; fire insurance, 5,200, *a* ⅓ %, 17 32; drayage, 28 86; storage & labor, 48 10; weighing & taring, 9 62; inspection & branding, 4 81; cooperage, 24 05; Gov't tax, 12 63; telegrams to W. E. Milton, 6 50; interest on charges, 2 58	193 56	
Commissions, 2½ %	126 30	
		1,219 11
		$3,832 77

E. & O. E. New York, Sept. 24, 1868.

G HEINEKEN & PALMORE.

Exhibit "H" to deposition of Mr. Stratton.

Account sales of 551 bbls. flour, for account of Balie Peyton,
73 esq., Gallatin, Tenn., by G. Heineken & Palmore, New York.

1868.

Oct. 17.	Sold	1	bbls.	Peytona			11 50
" "	"	6	"	" *a* 11 25			67 50
" 23.	"	15	"	S. Camp, *a* 10 15			152 25
" "	"	30	"	Peytona, *a* 11 50	345 00		
				Short weight	3 65		
							341 35
" 29.	"	80	"	" *a* 11 25	900 00		
				Short w't	8 20		
							891 80
" 31.	"	93	"	" *a* 11 25	1,046 25		
		275	"	S. Camp, *a* 10 15	2,791 25		
					3,837 50		
				Short weight, &c	28 57		
							3,808 93

Nov. 7. " 51 " S. Camp, *a* 10		510 00	
Short weight		3 78	
			506 22
			$5,779 55

CHARGES.

Freight, 560 bbls		1,015 40
Inland insurance, 6,000, *a* ¾ %; marine insurance via Savannah, 1,400$ *a* 1 %	59 00	
Fire insurance	20 00	
Drayage	33 54	
Storage & labor, putting in & out of store	55 90	
Weighing & taring	11 18	
½ inspection & head-branding	5 59	
Cooperage	27 95	
Interest on freight	4 47	
Gov't tax	5 78	
Commissions, 2½ %	144 50	
		1,383 31
Due, Oct. 31, 1868		$4,396 24

E. & O. E. New York, Dec. 2, 1868.

G. HEINEKEN & PALMORE.

74 *Deposition of A. Frierson.*

Question. Were you a member of the firm of Little & Frierson, doing business in Shelbyville, in 1868?

Answer. I was.

Question. Did you receive a shipment of flour from the mills of Balie Peyton in Sumner County, Tennessee, on commission? If so, state how much and what you sold it for, and the expenses, showing the net proceeds.

Answer. I did receive from the mills of Balie Peyton, in Sumner County, eighty barrels of flour on commission. I sold it at the figures as given in the exhibit herewith filed, marked "A," which also shows a net balance of $747 10.

Question 3. To whom did you sell the 17 barrels as stated in the account or Exhibit "A?"

Answer. To various parties; I can't say to whom. The 17 barrels were not all sold at the same time as appears in the account, but
75 were sold from day to day, and the sales consolidated.

Question. In what respect was the one barrel damaged that you sold for two dollars?

Answer. It was wormy; I sold it for eight dollars originally, but it was returned to me, and I disposed of it for $2 00.

Question. Was there any special contract between you and Mr. Peyton about the commissions you were to charge; if so, what was it?

Answer. There was no contract between us.

Question. Will your day-book show to whom the 17 barrels were in detail sold?

Answer. No, sir; it will not. We had a stated price, such as the market would justify, and when the market changed, we changed the

price accordingly. The market price here, from 1st to 30th July, 1869, was $8 per barrel, and during that period, we sold 17 barrels of flour sent to us from the Peyton Mills. Therefore, on the 30 July, 17 bbls. at $8 were put to Mr. Peyton's credit.

In answer to your fifth question, I will further state that there
76 was a contract between myself, or firm, and D. C. Douglass, agent of Mr. Peyton, and the contract was for the sale of the flour at 50 cents per barrel, upon these conditions: that my firm was to have a car load of flour to sell on commission; and when sold, we were to retain pay for the wheat we had let Douglass have, and commission at 50 cents per barrel aforesaid, on the sale of the flour. This arrangement was made before we let Douglass have the wheat. My books do not show the particular individuals to whom the flour was sold, and my memory cannot recall all of the parties.

A. FRIERSON.

Exhibit "A" to depo. of A. Frierson.

J. B. Peyton & Co., in ac. with A. Frierson.

1869.		Cr.	
June 25.	By sale, 61 bbls. flour, @ 12 50		762 50
July 1.	" " 1 " " @		9 00
" 30.	" " 17 " " @ 8 00		136 00
Oct. 1.	" " 1 " " @ (damaged)		2 00
			909 50

1868.		Dr.	
Nov. 18.	To freight bill and charges on 80 bbls. flour.	57 15	
77 Aug. 17.	To insurance for 6 mo's	13 70	
" " "	commissions	91 55	
			162 40
Bal. due			$747 10

Statement of R. B. Davidson.

I am one of the counsel engaged in the prosecution of the suit of G. Heineken & Palmore against Little & Frierson, in the circuit court at Shelbyville.

The defendants rely upon a set-off for $575, founded upon their claim that they sold Hon. Balie Peyton wheat of that value through the agency of Mr. D. C. Douglass. The set-off is disputed on two grounds: 1st. That Douglass had no authority to buy wheat for Peyton on time; 2nd, That the equity of Heineken & Palmore to the proceeds of this flour is prior to the set-off claimed.

In the prosecution of that suit, which has not yet been reached for trial, we expect to charge about seventy-five dollars. There will, I think, certainly be a judgment for some amount against Little & Frierson; enough to carry costs. I charge nothing for assisting to take Mr.
Frierson's deposition in the suit in the federal court, at Nashville,
78 between Messrs. Heineken & Palmore and Peyton, having been requested by both parties to act for them in that matter.

R. B. DAVIDSON.

On 17 day of November, 1869, the special commissioner filed a report, which is as follows:

To the Hon. CONNALLY F. TRIGG, judge, &c.:

In obedience to the decree of this court in the case of Heineken & Palmore against Balie Peyton, appointing myself as commissioner, and directing me to take an account between the parties mentioned, I would respectfully report the following as the result of my investigation from the papers, proofs, and exhibits in the cause:

I report that I find from the proof, that the complainants exercised all due diligence as factors and commission merchants, and that they sold the flour consigned to them by the defendant for the best market price that could have been obtained for the same brand of flour.

79 I further find that all the brands of flour shipped by defendant were not regular, but varied greatly in quality, thus impairing its sale. From an investigation of the proof, I find that the charges for selling, &c., made by complainants was customary, and in accordance with the usage and custom of commission merchants in New York. I decline to allow the defendant for any credit for the insurance effected by him previous to his shipments to New York, as there is no proof that the complainants were notified of the existence of any policy of insurance upon said shipments, and the insurance effected by complainants was for the benefit of defendant. I further find the amount due by the account of Heineken & Palmer, on December 28, 1868 to be. $10 034 05

Interest thereon to Nov. 19, 1869, at 7 %..... 693 70

Total due..... $10 727 75

But I have allowed the following credits, which are to be deducted from this amount:

From the contract between the parties, I think that the defendant was entitled to $4,000 in money upon the draft drawn on 24 or 28th of August, 1868, (both drafts being, I think, the same draft, there being a discrepancy as to date,) and should not lose the discount of $40 00.

I therefore allow him the..... $40 00

Interest from Aug. 24, 1868, 7 %..... 3 55

43 55

80 The complainants have still in their possession 9 barrels of flour, still unsold, which was not included in the account of complainants. There is no proof as to the quality or brand of said 9 barrels, and in the absence of proof, I have felt inclined to allow the defendant $11 50 per barrel for same, it being the highest market price for which complainants sold any of his flour.

Therefore, I allow 9 bbls. of flour, *a* 11 50..... $103 50

Deducting 2½ % commissions & estimated expenses..... 5 00

98 50

Int. on this am't from 1st Dec., 1868, at 7 %..... 6 59

Balance due..... 105 09

I further report that the defendant made the following payments for the complainants, which should be credited, to wit:

Jan'y 16, 1869, paid W. E. Milton, agent	$450 00	
Interest 10 mos., 7 %	26 25	
		476 25
Feb'y 5, 1869, paid N. Hobson	175 00	
Int. 9 mos. & 10 days	10 53	
		185 53
Jan'y 23, 1869, paid	50 00	
Int. 9 mos. & 23 days	2 80	
		52 80
March 23, 1869, paid	180 33	
Int. 7 mos. 23 days	8 16	
		188 49
Feb'y 5, paid	50 00	
Int. 9 mos. & 10 days	2 72	
		52 72
Total payments and interest		$955 79

81 In addition, I find that defendant, Peyton, by order of the agent of complainants, shipped to Atlanta, Ga., to Messrs. Langston, Crane & Hammock, 160 barrels of flour upon their account, and that the same was sold and netted $1,447 20, which account of sales was furnished complainant's agent on the 12 day of Feb'y, 1869. I further report that 80 barrels of flour was shipped by defendant to Little & Frierson, Shelbyville, Tennessee, by order of Milton, agent of complainants, but there is no proof before me as to what was the net proceeds of the sale of the said barrels of flour. I further find that the proceeds of the 160 barrels of flour shipped to Atlanta, and the 80 barrels of flour shipped to Shelbyville, has been attached for the debts of defendant, and that said suits are being defended by said complainants. If the complainants shall be successful in their defense, the defendant would be entitled to a credit of the proceeds of both shipments, to wit:

160 barrels, shipped to Atlanta	$1,447 20	
Interest from 12 Feb'y 1869, *a* 7 %	76 69	
		$1,523 89
To the 80 barrels shipped to—	$	
Interest from day of sale, 7 %	$	
Total	$	

82 I further report that the defendant shipped to complainants barrels of meal, worth $240, and that he is entitled to a credit for same.

By barrels of meal	240 00	
Interest from Dec. 1, 1868	16 00	
		$256 00

RECAPITULATION OF REPORT.

Account of Heineken & Palmore, rendered Dec. 1, 1868			$10,034 05
Int. from Dec. 1, 1868, to Nov. 15, 1869, *a* 7 %			693 70
Total account and interest			$10,727 75
CREDITS.			
By loss by discount on draft	$40 00		
Interest from Aug. 24, '69, to date, 7 %	3 45		
		43 55	
By nine barrels of flour, *a* 11 50 per bbl	103 50		
Deducting commissions, &c	5 00		
	98 35		
Interest	6 59		
		105 09	
Further payments in cash, aggregated		955 79	
By shipment of meal		256 00	
" " to Atlanta		1,523 89	
" " " Shelbyville		$	
Total credits allowed			2,884 32
Balance due after deducting credits to Nov. 15, 1869			$7,743 43

All of which is respectfully

R. W. PRITCHETT,
Commissioner.

Nov. 15, 1869.

83 On the 11th day of May, 1870, a decree was rendered, which is as follows:

G. HEINEKEN & PALMORE
v.
BALIE PEYTON.

This cause was on this, the 11th day of May, 1870, heard in the circuit court of the United States for the middle district of Tennessee, on the chancery side, before the Hon. Connally F. Trigg, judge, &c., upon the report of the special commissioner appointed by this court at a former term in this cause, which said report is in the words and figures following, to wit:

To the Hon. Connally F. Trigg, judge, &c., presiding in the circuit court of the United States for the middle district of Tennessee, at Nashville:

In this cause, at the last term of your honor's court, I, as special commissioner, made a report, which is now on file in the papers of this cause, since which time both parties litigant have thought proper to take additional proof. The proof is of such a character, involving fresh calculations, &c., that I find it impossible to supplement my former report, and I therefore present this report, and ask that it be taken
84 in lieu of the former report now on file.

I respectfully report the following as the result of my investi-

gation from the pleadings, proofs, and exhibits in the case. I find that the complainants, Heineken & Palmore, exercised all due diligence and energy as factors and commission merchants, and that they sold the flour consigned to them by the defendant for the best market price that could have been obtained for the same kind of flour. I further find that all the brands of flour shipped by defendant were not regular, but varied greatly in quality, thus impairing its sale. From an investigation of the proof I find the charges for selling, &c., made by complainants was customary, and in accordance with the usages and customs of commission merchants in New York. I decline to allow the defendant any credit for the insurance effected by him previous to his shipment to New York, as there is no proof that the complainants were notified of the existence of any policy of insurance upon said shipments, and the insurance effected by the complainants was for the benefit of defendant.

85 I further find the amount due from defendant, by the account of Heineken & Palmore, to be, on Feb'y 29, 1870, as follows:

Account		$10,077 99
Interest thereon from date to Feb'y 11, 1870, at the rate of 7 %, 11 mo's 10		666 26
		$10,744 25

I, however, allow the defendant the following credits, which should be deducted from that amount, viz:

From the contract between the parties I think the defendant was entitled to $4,000 in money upon the draft drawn the 24th or 28th of August, (both drafts being the same, there being a discrepancy as to dates,) and should not loose the discount of $40 00.

I therefore allow him the	$40 00	
Int. from Aug. 24, 1868, to Feb'y 11, 1870	4 19	
		$44 19

I further report that the defendant made the following payments for the complainants, which should be credited, to wit:

Paid to W. E. Milton, agent, Jan'y 13, 1869	$450 00	
Int. 12 mo's & 28 days, to 11 Feb'y, 1870	33 95	
		$483 95
Feb'y 5, 1869, paid G. W. Palmore	50 00	
Int. 1 y'r 5 d., to Feb'y 11, 1870, 7%	3 54	
		53 54
Feb'y 5, 1869, paid Bank of Nashville for complainants	225 00	
Int. 1 y'r 5 d., to 11 Feb'y, 1870, 7 %	15 97	
		240 97
Jan. 23, 1869, endorsed a check of Dodd & Simmons to complainants at Bank of Nashville	300 00	
Int. 1 y'r 15 d., to Feb'y 11, 1870, 7 %	21 87	
		321 87
86 Jan'y 23, 1869, check to Heineken & Palmore at Bank of Nashville of Dodd & Simmons	180 33	
Int. 12 mo's 15 days, to Feb'y 11, 1870, 7 %	12 14	
		192 57

The defendant is also entitled to a credit for the sale of the flour at Atlanta, with interest from the date thereof:

Amount of sales at Atlanta	$1,230 52
Int. from date of sale to Feb'y 11, '70, 7 %	84 47
	1,314 99

I also allow defendant credit for sale of 8 barrels of flour, sold by Heineken & Palmore, for $46 55
Int. from Dec. 29, 1868, to Feb'y 11, 1870, 7 % 3 64
$50 19

I also find that the defendant shipped to Shelbyville, by order of Milton, agent of complainants, 80 barrels of flour to Little & Frierson, and that the same has been attached for the debts of defendant, and that said suits are now being defended by complainants. Now, if said complainants shall be successful in their lawsuit, the defendant would be entitled to a credit for the net proceeds of the flour shipped as above stated. I further find the net proceeds of the said 80 barrels of flour sold by Little & Freerson, of Shelbyville, to be as follows:

Net proceeds of sales	$747 10
By agreement the def't is to pay the fee of the att'ys, which is proven to be	75 00
	$672 10
87 Int. from Oct. 2, 1869, to Feb'y 11, 1870, 7 %	14 37
Total Shelbyville flour	$686 47

I find and report that from the proof the defendant, Peyton, agreed to deliver on the cars at Sandersville, Tennessee, 80 barrels of corn-meal for which Messrs. Heineken & Palmore agreed to pay $3 00 per barrel delivered on the cars, and the charge of $39 29 for the sale of said meal by M. A. Parrish & Co., of Nashville, is improperly charged to defendant, Peyton, because under the contract and from the proof the meal belonged to Heineken & Palmore at Sandersville, and Peyton thereafter had nothing to do with it. I further report that subsequently 16 barrels of meal became damaged, and it was agreed between Palmore and the son of defendant, that M. A. Parrish should sell the 16 barrels of damaged meal and pay Mr. Palmore, the proceeds thereof, deducting the amount of damage. I therefore allow the defendant the following credit:

80 barrels of meal at $3 00	240 00
Int. from April 1, 1869, to Feb'y 11, 1870	13 06
	253 06

I allow the plaintiffs the following credit for the damaged meal:

The loss on the sale of meal as per acc't of M. A. Parrish & Co	18 80
Int. 9 mo's. & 11 days	93
Total	$19 73
88 Total sale of meal	253 06
Deduct damaged meal	19 73
Credit allowed Peyton	$233 33

I find that defendant shipped to W. E. Milton, agent of complainants at Louisville, Ky., on Sept. 29, 1868, 14,135 pounds of wheat bran, and on 7 Oct., 1868, I find that defendant shipped to the same party 34,206 pounds of wheat bran, to be sold and the proceeds turned over to complainants. The defendant is entitled to a credit for this, but there being no proof as to the amount of net proceeds from sales of said brand, I can do nothing with it, and as to that can make no report. I decline to allow the credit of $189 40, claimed to be due from the L. & N. R. R. to defendant, and alleged to have been paid to complainants by the road.

RECAPITULATION.

Account of Heineken & Palmore to Feb'y 11, 1870, as per calculation		$10,744 25
Cr.		
By return discount on draft	44 19	
Paid W. E. Milton, agent	483 95	
" G. W. Palmore	53 54	
" B'k of Nashville	240 97	
" " " "	321 87	
89 " " " "	192 57	
Atlanta flour	1,314 99	
8 bbls flour sold by compl'ts	50 19	
Shelbyville flour	686 47	
B'y 80 bbls meal	233 33	
		3,622 07
Balance due complainants		$7,122 18

All of which is respectfully submitted.

R. W. PRITCHETT,
Commissioner.

And upon the exceptions to said report by the complainants which are in the words and figures following, to wit:

In this cause the complainants by their solicitor excepts to the report of the commissioner made to the present term and assign the following as their exceptions:

1st. The commissioner allows interest on the $10,077 99, only from

29 Feb'y, 1869, whereas every cent advanced by complainants was advanced prior to Dec. 1, 1868, and in their contract it was expressly stipulated that they should have interest from time of advance.

2d. The commissioner allows a discount of $40 on the draft for $4,000 wrongfully.

3d. He deducts the net proceeds of the flour shipped to Shelbyville, when no part of said proceeds have ever been paid to complainants. The flour belonged to defendant and the proceeds could not have been charged against complainants until actually paid to them.

90 And upon the exceptions to the said report by the defendant, which are in the words and figures following, to wit:

1st. The commissioner should have commenced the account by charging Peyton with the sum of $1,034 05, instead of $10,077 99, a difference of $43 94, as this is the sum shown by Exhibit No. 3 to depositions of Palmore, Spooner & Burkholder, the former the partner, and the latter two the book-keepers, and the amount is sworn to in the bill as correct. (See page No. 3 of the bill.)

2nd. The commissioner has allowed complainants $98 48 inland insurance on the flour shipped to New York. There is no proof that it was ever paid, and if it was it was wholly unnecessary, as the common-carrier insurance was sufficient.

3d. Complainants are allowed fire insurance to the amount of $37 33. That also was unnecessary, for the reason stated above.

4th. The commissioner has refused to allow defendant $ for marine insurance, which defendant took upon the goods.

5th. The net proceeds of the flour sent to Atlanta is $1,447 20.

91 The commissioner has allowed defendant credit for only $1,314.99, charging the balance to Peyton of $135 21 for attorney's fees & costs; he should not be charged with them.

6th. The commissioner has refused to allow Peyton 48,341 lbs. of bran shipped to complainants' agent at Louisville. (See receipt of R. R. and John Peyton's depo.) The bran is proven to be worth $17 per ton, making $308 00. (Shipped Sept. 29 & Oct. 8, 1868.)

7th. The commissioner failed to allow Peyton for $189 40 of drawback paid by R. R. to agent of complainants on freight.

And the court being of opinion that the first and third exceptions taken by the complainants are not well taken, and ought to be disallowed, but that the second exception to said report by the complainants is well taken and ought to be allowed, doth order, adjudge, and decree accordingly.

And the court being further of opinion that the first, second, third, and fourth exceptions of the defendant to said report are not well taken and ought to be overruled & disallowed; but that the fifth exception taken by defendant, to the extent of one hundred dollars, and his sixth and seventh exceptions are well taken and ought to be allowed,

92 doth order, adjudge, and decree accordingly.

It is now, therefore, ordered, adjudged, and decreed by the court that the complainants, G. Heineken & Palmore, recover of and from the defendant the sum of six thousand four hundred and sixty-two $\frac{26}{100}$ dollars, with interest, from the 11th Feb'y, 1870; and unless the same is paid to the said complainants by the 1st July, 1870, the clerk of this court is ordered to sell at public sale the real estate mentioned in the bill and former decree of this court, being three and three-fourths acres of land in Sumner County, State of Tennessee, and situated on the Gallatin turnpike road, about 4½ miles west of the town of Gallatin, with all the houses, improvements, and fixtures thereon, and also

the one acre of ground on which the miller's house stands, after he has advertised the same according to law and the practice of this court, for twenty days. And, upon the application of complainants, he is ordered to sell said property upon a credit of six, twelve, and eighteen months, free from the equity of redemption or right to repurchase, taking
93 three notes therefor in equal amounts, each with good personal security, and reserving a lien until the same are paid upon said property, and when collected he will pay the money over to the said G. Heineken & Palmore, or their solicitors, or so much thereof as may be necessary to satisfy this decree, including the costs, it being the intention of the court to charge the defendant with the payment of the costs. And should the property not sell for enough to satisfy this decree, he will issue execution for the balance. And inasmuch as the commissioner has allowed to the defendant, as a payment, the net value of the flour shipped to Little & Frierson, of Shelbyville, and for the recovery of which suit is now pending; and inasmuch as the complainants, G. Heineken & Palmore, are also charged with three hundred and eight dollars for bran shipped to complainant Wm. E. Milton, and for which it is alleged by the said G. Heineken & Palmore that said Milton has never accounted to them, and the said sale was a private transaction with said Milton individually: It is, therefore, now further ordered and decreed, with the consent of said Peyton, that if the said suit
94 against Little & Frierson should fail because of any liability to them by the said Peyton, then the said Peyton is to be liable to the said G. Heineken & Palmore for the same, to the extent hereinbefore allowed him as a credit therefor. And it is also decreed, with the consent of said Peyton, that should the said G. Heineken & Palmore fail to recover of the said Milton, for the bran aforesaid, because the same was sold to said Milton individually and in his own right, or was accounted for by him to said Peyton, then the said Peyton is to become responsible to G. Heineken & Palmore therefor.

It is further ordered that the clerk report reasonable compensation to the commissioner for taking the account, and also report to the next term how he has executed this decree, and from time to time as occasion shall require, until the coming in of which, other matters are reserved.

On the 14th day of May, 1870, an order was made, which is as follows:

95 G. HEINEKEN & PALMORE ET AL.
v.
BAILIE PEYTON.

In this cause the defendant prays an appeal to the next term of the Supreme Court, to be holden at Washington City on the first Monday in December, 1870; and the court orders and allows the same, upon the defendants giving bond and security in the sum of thirteen thousand dollars, conditioned to prosecute his appeal with effect, and answer and perform such decrees as said Supreme Court may give. And it is ordered that the defendant have ten days in which to execute said bond.

Appeal bond.

G. HEINEKEN & PALMORE
vs.
BALIE PEYTON.

Know all men by these presents that we, Balie Peyton and J. R.

Barry and James Soper, are held and firmly bound unto G. Heineken and G. W. Palmore, partners in trade under the firm-name and style of G. Heineken & Palmore, in the sum of thirteen thousand dollars, to be paid to the said Heineken & Palmore, their executors, or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, and administrators jointly by these presents, and sealed with our seals and dated this 14 day of May, 1870.

96

Whereas the above-bounden Balie Peyton hath taken an appeal to the Supreme Court of the United States, sitting at Washington, from a decree of the circuit court of the United States for the middle district of Tennessee, and to reverse the decree rendered in the above-entitled suit:

Now, therefore, the condition of the above obligation is such that, if the above-named Balie Peyton shall prosecute his said appeal to effect, and shall well and truly perform any decree pronounced in said suit by said Supreme Court, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed with our seals the day and date above written.

BALIE PEYTON. [SEAL.]
J. R. BARRY. [SEAL.]
JAMES SOPER. [SEAL.]

97

The above bond was sealed and acknowledged and delivered in my presence, and ordered to be taken, and is approved May 14, 1870.

CONNALLY F. TRIGG,
U. S. District Judge.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings in the cause of G. Heineken & Palmore against Balie Peyton, lately determined in our said court, as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court at my office, in the city of Nashville, this the 22d day of August, A. D. 1870, and the 95 year of our independence.

[SEAL.] E. R. CAMPBELL, *Clerk.*

(Indorsement on cover:) No. 326. Balie Peyton, appellant, vs. G. Heineken & G. W. Palmore. M. Tennessee, C. C. U. S. Filed 5th December, 1870.